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No. 669

SUPREME COURT OF THE UNITED STATES

CHARLES L. THOMAS, ET AL., Appellants,

versus

BROADWAY BAPTIST CHURCH, a Corporation, Appellee.

PETITION FOR CERTIORARI.

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WESTERFIELD-BONTE CO., INCORPORATED LOUISVILLE, KY.

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Supreme Court of the United States

CHARLES L. THOMAS and his wife, JEWELL E. THOMAS; JOHN H. WELCH and his wife, MARTHA C. WELCH; J. W. JONES and his wife, CLARE V. JONES; FRANK J. PADWICK and his wife, TAIMI J. PADWICK; MILTON F. JEFFERSON and his wife, LYSADEAN W. JEFFERSON; DAVIS M. HOWERTON, JR. and his wife, MARTHA FLOYD HOWERTON; SCOVILLE W. DUNCAN and his wife, ALTA MAE DUNCAN; SHERMAN H. MEYER and his wife, JACKLYN M. MEYER; FRIEDRICH WOLFGANG FINGER, JR. and his wife, DOROTHY O'NEIL FINGER; HARRY G. DAVIS and his wife, MARY G. DAVIS; DAVID M. LONGENECKER and his wife, RACHEL ANNE LONGENECKER, and WILLIAM P. SHUSTER and his wife, LUCILE B. SHUSTER, - - - - *Appellants,*

v.

BROADWAY BAPTIST CHURCH, a corporation, *Appellee.*

PETITION FOR CERTIORARI.

At their petition for the allowance of a writ of certiorari the appellants respectfully state:

1. (a) The opinion of the trial court in this case appears in the Transcript of Record, pages 35 to 51. Two opinions were delivered in the case by the Court of Appeals of Kentucky. The original opinion of that Court appears in the Transcript at pages 134 to 136.

The modified and final opinion appears in the Transcript at pages 153 to 155. The final opinion is reported in 316 S. W. 2d 698, as City of Druid Hills, *et al.* v. Broadway Baptist Church.

(b) (i) The judgment of the Kentucky Court of Appeals affirmed the judgment of the trial court. The judgment of the appellate court is dated May 2, 1958. It appears at page 133 of the Transcript. Appellants filed their Petition for Rehearing with the appellate court June 2, 1958, which appears in the Transcript at pages 138 to 149.

(ii) The original opinion of the appellate court was modified and the Petition for Rehearing overruled October 31, 1958.

(iii) 28 USC 1257 (3) gives this Court jurisdiction to review by writ of certiorari final judgments rendered by the highest court of a state "where any title, right, privilege, or immunity is specially set up or claimed under the Constitution" of the United States. In this case appellants claim a right under the Fourteenth Amendment to the Federal Constitution.

(c) The questions presented for review are: (1) whether the judgment amounts to an appropriation of a public street to private control by appellee and deprives appellants of their property without due process of law, contrary to the Fourteenth Amendment, and (2) whether the judgment is so flagrantly contrary to law as to be arbitrary and capricious and deprives appellants of their property without due process of law, contrary to the Fourteenth Amendment.

(d) The following Kentucky statutes are involved in this case, and may be found in the official edition of the Kentucky Revised Statutes under the following numbers:

88.080. The board of trustees of the city may pass ordinances not in conflict with the Constitution or laws of this state or of the United States. It may do and perform any and all acts and things necessary or proper to carry out the provisions of the laws relating to cities of the sixth class, and may exact and enforce within the city limits all local, police, sanitary, and other regulations not in conflict with general laws.

94.292 (3). Subject to the provisions of KRS 94.291 to 94.325, the city legislative body shall have full power to determine what public improvements shall be made, the extent and character of the improvement, the kind of material to be used, and the necessity for the improvement, and its determination shall be final.

94.297 (1). Except as provided in 94.298 and 94.299, the city legislative body, in the original ordinance providing for the making of any public improvement, shall provide that the improvement be made at the exclusive cost of the owners of the benefited property, as defined in KRS 94.301, or shall have the alternative or providing that the city shall pay a specified part of the cost and the owners of benefited property shall pay the balance.

94.301. In the case of street improvements, the benefited property shall consist of all real estate abutting upon both sides of the portion of the street to be improved, * * *

> 94.670: The city legislative body in cities of the sixth class may cause to be removed any obstructions in the streets of the city. It shall cause to be opened any public way dedicated to the town that is closed, but before doing so shall give to the adjacent property owners one month's notice thereof.

(c) The appellee, Broadway Baptist Church, is a corporation, which owns 7.22 acres of land on which is located church buildings. The land fronts 728 feet on the south side of U. S. Highway 42. The land was acquired by appellee in 1948. The church buildings were erected soon thereafter. The entire property has been used for church purposes since July 2, 1950, with Highway 42 being used for ingress and egress.

The western boundary line of the church property extends from U. S. 42 southward 575.73 feet. Immediately west of the western line of the church property is a residential subdivision known as Brownsboro Village (see plat, page 14 of Transcript). This subdivision was fully developed before appellee acquired the aforesaid tract of land. Within the subdivision is a dead-end street, or court, known as Olympic Avenue. The court is about 300 feet south of and parallel to Highway 42. The court is a strip dedicated as a public way, 75 feet wide and extending from Chenoweth Lane eastward 600 feet to the western line of the church property. The paved portion of the court is nineteen feet wide and extends from Chenoweth Lane eastward to a point six feet from the church property. There are thirteen homes on the court. Heretofore the court

has been used principally by the residents thereon and such members of the public who had occasion to use it as a short dead-end street. The court has been improved and maintained at the sole expense of the resident property owners thereon.

In 1948 the appellee sought permission from the County Zoning Commission to use its land for church, playground, and recreational purposes, and to use Olympic Avenue as a means of ingress and egress to and from the church property. The then residents of Olympic Avenue objected to the opening of the court and its conversion into a street to serve as a means of access to the church premises. That controversy reached the courts. The local circuit court, common pleas branch, rendered a judgment in favor of appellee. On appeal to the Court of Appeals an opinion was delivered June 10, 1949, reversing the lower court but not deciding the issues, which opinion is reported as Hill, *et al.* v. Kesselring, *et al.*, 220 S. W. 2d 858. Following that decision, on July 21, 1949, the trial court entered an injunctive judgment which, among other things, reserved for future determination the right of the church and its congregation to use Olympic Avenue, and provided "* * * and the Broadway Baptist Church and its congregation shall make no use of Olympic Avenue pending the final determination of this action." The appellee did not further pursue that action, the last step being an order remanding the case in August, 1950.

The city of Druid Hills was incorporated as a sixth class town in 1949. The legislative body of the town is

a Board of Trustees. The town embraces the church property and Olympic Avenue.

Appellee made no effort to obtain an opening or extension of Olympic Avenue for church traffic from August, 1950, until November 19, 1955, when appellee's attorney wrote a letter to the Board of Trustees of Druid Hills, requesting the Board to require the removal of the various objects in the six foot strip between the end of the paved portion of Olympic Avenue and the church property, which objects consisted of trees, shrubbery and guard posts, which appellee claimed were obstructions within the street. The Trustees declined to remove the objects or to approve their removal. Thereupon this suit was filed March 3, 1956, by appellee against the City of Druid Hills, its Trustees and the owners of the thirteen lots abutting on Olympic Avenue, asking the court to enjoin the Trustees from continuing to refuse to remove said objects, or from refusing to permit appellee to remove them and to pave the portion of the Avenue now occupied by the objects, and to enjoin the defendants from interfering with such action by the appellee and from interfering "with the use of said Avenue by persons seeking ingress or egress to or from" appellee's property. There was no demand that appellee be adjudged the right to use the Avenue as access to its own property.

The appellants answered appellee's complaint and pleaded, among other things, (1) that the complaint did not state a claim upon which relief could be granted; (2) that the injunctive judgment in the Hill case was still effective and was a bar to appellee's

claim; (3) that appellee had negligently failed to assert its claim from July 2, 1949, to November 19, 1955, during which time appellee had used its property without making any use of Olympic Avenue, and had acquiesced in the use and maintenance of the Avenue, as a dead-end street, and during which time the defendant owners of two homes on the street, in 1952, made improvements to their homes at a total cost of $16,393.00 with knowledge that appellee had asserted no claim to the use of the court since 1949 which led them to believe that appellee had abandoned its alleged claim, and that the appellee was thus guilty of laches, and that if appellee's demand be granted it would deprive them of their property without due process of law, contrary to the Federal Constitution; (4) that during said time, in 1952, 1953, 1954, 1955, 1956, the defendant owners of seven homes on the court had purchased their homes with knowledge that appellee was regularly using its premises without making any use of Olympic Avenue, and that they would not have purchased their homes if they had known that appellee was claiming any right to open the easterly end of Olympic Avenue to church traffic, and that to permit appellee now to so open the Avenue would deprive them of their property without due process of law, contrary to the Federal Constitution; (5) that no part of appellee's property abuts or fronts on Olympic Avenue, and no part of appellee's property is a part of the subdivision known as Brownsboro Village, and the dedication of said Avenue as a public way was not for the benefit of the owner of appellee's property or any person having a special

right to use appellee's property, and (6) that the alleged obstructions are not obstructions on or across said Avenue, but consist of trees over twenty years old, and shrubbery planted March 17, 1948, and four guard posts erected August 5, 1949, to protect the trees and shrubbery from damage by motor vehicles turning at the closed end of the Avenue; that said trees, shrubbery and guard posts are within the area between the end of the paved street and appellee's property, a zone extending a distance of six feet, and that said trees, shrubbery and posts do not interfere with or obstruct the public use of the Avenue.

The claim of the appellants, pleaded in their answer, that a part of the relief sought by appellee would deprive appellants of their property without due process of law, contrary to the Federal Constitution, was passed on by the court of first instance by stating in his written opinion that " 'due process of law,' by virtue of KRS 94.670, requires cities of the sixth class to keep open all dedicated public ways" (Transcript, page 43). And further, on page 49 of the Transcript:

> Defendants' claim that plaintiff's proposed use of Olympic Avenue will constitute an unconstitutional taking of their property is without merit. It does appear somewhat inequitable that defendants, as property owners abutting the sides of Olympic Avenue, as presently constituted, must bear the entire expense of building and maintaining the paved portion of the street and see it used and perhaps damaged by others without recompense. Yet that same possible inequity applies to

all publicly-dedicated streets. The property owners who pay the cost do not enjoy the exclusive rights to the use of the streets.

The appellate court did not pass on the federal questions. The federal question of the appellants being deprived of their property without due process of law was specifically presented to the appellate court in appellants' petition for rehearing as appears on pages 140 and 145 of the Transcript.

The City of Druid Hills and its officials have not joined in this petition because the City, not owning any of the property involved, cannot claim that it has been deprived of its property. Appellants claim their property will be damaged $56,000.00.

(f) Appellants wish to amplify the reasons relied on for the allowance of the writ by the following argument:

Said KRS 94.292 (3) vests the city legislative body with the sole and final authority to determine the necessity of paving and extending Olympic Avenue to appellee's property. The legislative body has exercised its discretion and decided against such an extension of the street. Appellee makes no claim of fraud, collusion, or bad faith by the Trustees. The state courts have overriden such authority and function of the legislative body and transferred the authority to appellee. Such action by the state courts will result in appellants, as abutting property owners on each side of the street and liable for its maintenance, being deprived of their property, not by appellee using the street but by mem-

bers of the public who desire to use it in going to and from appellee's property. The members of the public who desire to use the street should be limited to using it as it now is, and as the Trustees, for obviously sound reasons for the public interest, have said it should be used by the public. The injunction against the Trustees is permanent. They will no longer be authorized to exercise any control over a portion of a public street. Appellee will control and determine the necessity and nature of the improvement and the manner of its use by the public. This special control and use permitted by the state courts will place an extra financial burden on appellants, and it will be an added servitude on their property. Appellants contend that due process under the Fourteenth Amendment requires that they not be deprived of their property in that respect. This presents a federal question of substance not heretofore determined by this Court. The Trustees have a wide discretion in determining what precautions in the public interest are necessary or appropriate under the circumstances. New Orleans Public Service v. New Orleans, 281 U. S. 82, 74 L. Ed. 1115.

The decision of the appellate court is arbitrary and flagrantly contrary to law for the following reasons:

1. The decision fails to give effect to the provision of KRS 94.292 (3) that the Trustees have the power to determine the necessity to improve and extend Olympic Avenue, and its determination "shall be final".

2. The alleged obstructions do not constitute obstructions in the street, and do not operate to close the street within the meaning of KRS 94.670, because those

objects do not interfere with the use of the street by the public. It would be just as reasonable to say that the street is closed because it is not paved the full width of the easement and because there are trees and shrubbery within the easement and on each side of the present pavement.

3. The court ruled that appellee was not guilty of laches after a delay of more than five years in asserting its alleged right. This was contrary to the court's earlier ruling in the case of Stratton & Terstegge Co. v. Meriweather, 150 S. W. 381, wherein the court ruled: "But it has been frequently declared that, when the works (obstructions) complained of had been allowed to stand three years before suit, it was such laches as would prevent relief in equity." The same court ruled in the case of Home Laundry Co. v. City of Louisville, 182 S. W. 645, that the right of an abutting property owner to use a street for ingress and egress is a private right which may be lost or abandoned.

4. The decision permits appellee to remove the trees and shrubbery without compensation to the abutting property owners, although the evidence shows that money was expended for their purchase and planting.

5. The appellate court disregarded the injunction granted in the Hill case. That injunction has never been modified or set aside.

The denial of due process to appellants is to be tested by an appraisal of the totality of facts in the case. Betts v. Brady, 316 U. S. 455, 86 L. Ed. 1595.

The due process exacted from states is a conception of fundamental justice. Foster v. Illinois, 332 U. S. 134, 91 L. Ed. 1955.

The action of state courts is regarded as action of the state within the meaning of the Fourteenth Amendment. Shelly v. Kraemer, 334 U. S. 1, 92 L. Ed. 1161.

Wherefore, the appellants petition this Court to issue its writ of certiorari for review of the appellate court judgment, and that this Court reverse the ruling of the state appellate court.

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